SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 233.
Miscellaneous.

JESSIE A. KILPATRICK,
Petitioner,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

Ex Parte JESSIE A. KILPATRICK,
Petitioner.

BRIEF AS AMICUS CURIAE OF NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY.

FRANK Y. GLADNEY,
JAMES C. JONES, JR.,
107 North Eighth Street,
St. Louis (1), Mo.
Attorneys for Amicus Curiae.

JOHN BUCKNER, JR.,
Of Counsel.

INDEX.

Table of Cases Cited.

Other Authorities Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 233.
Miscellaneous.

JESSIE A. KILPATRICK,
Petitioner,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent,

Ex Parte JESSIE A. KILPATRICK,
Petitioner.

BRIEF AS AMICUS CURIAE OF NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY.

STATEMENT OF INTEREST.

The *amicus curiae*, New York, Chicago and St. Louis Railroad Company, is defendant in an action brought by Del Vardaman for damages under the Federal Employers' Liability Act bearing cause No. 6908 in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, sitting in St. Louis, Missouri. Vardaman, and all the witnesses disclosed, reside in

Fort Wayne, Indiana, a distance of three hundred forty miles from St. Louis. A motion to transfer the cause to the Fort Wayne division of the Northern District of Indiana is on file and is now under submission. The Vardaman case was filed September 3, 1948, three days after the Judiciary Act became effective, and the question of retroactive application of Section 1404 [a] of the Judicial Code is not there involved. The method by which this and related cases come to this court are not involved in the Vardaman case, but the amicus is directly interested in the neat question of law: **does Section 1404 [a] apply to cases arising under the Federal Employers' Liability Act?**

ARGUMENT.

We leave discussion of the cases deciding the question in the district courts to the parties. A list of those known to the amicus is contained in Appendix II.

The proposition we address ourselves to may be expressed as follows:

> Congress could not have intended that the general language of 1404 [a] of the Judiciary Act should apply to the venue section of the F. E. L. A.,
>
> (a) Because of the presumption against implied repeal of a specific statute by a subsequent later statute, and
>
> (b) Because of the legislative histories of the Judiciary Act and of the contemporaneous Jennings bill.

(a)

The basis of argument (a) is the rule of law:

> "Implied repeals are not favored, and if effect can be reasonably given to both statutes, the presumption is that the earlier is intended to remain in force." U. S. v. Burroughs, 289 U. S. 159.

This point proceeds upon the assumption that Section 1404 [a] is inimical to Section 56 of the F. E. L. A.; that they cannot both stand side by side and that one must necessarily prevail over the other. The Sections are as follows:

28 U. S. C. A.—Judiciary and Judicial Procedure Act of 1948:

Sec. 1404 [a]:

> "For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer

any civil action to any other district or division where it might have been brought."

45 U. S. C. A. 56 (in part):

"Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such an action. The jurisdiction of the courts of the United States under this Chapter shall be concurrent with that of the courts of the several states, and no case arising under this Chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It is evident from a reading of Section 56 that the F. E. L. A. goes no farther than to designate the courts in which the plaintiff **may bring** his action. It is clear that in the absence of any statute authorizing the transfer of such cases from one district to another, neither the Federal Court nor the State Court can thwart the enactment of Congress by restraining the prosecution of a suit in a court designated by this Section. B. & O. v. Kepner, 314 U. S. 44; Miles v. I. C. R. R., 315 U. S. 698. However, where there is either a particular or a general authority to transfer such a cause there is nothing contradictory between such authorization and leave to bring such a suit in such a district. The suit is, indeed, brought in the district of the plaintiff's choice, but it is transferred after the filing permitted by Section 56 is completed.

This situation commonly exists in most jurisdictions. For example, in the State of Missouri, Section 871, R. S. Mo. 1939, describes the venue in which civil actions may be brought; Section 1062, however, authorizes transfer of the cause on change of venue to an adjoining or next adjoining circuit convenient to the parties for the trial of

the case, even though the district to which the cause may be removed may not be one which would have original jurisdiction under the venue statute, Section 871. It has never been claimed that there is anything inimical in these two statutes and there is no more reason in logic or in law why Section 1404 [a] should be held inimical to Section 56 than that Section 1062 should be inimical to Section 871.

This situation exists in each of the States. Notwithstanding the absolute right given a suitor to commence an action in a given county—frequently, as in the case of multiple defendants, with an absolute right to a choice of venue—the court may grant a change of the venue to another county against the suitor's will.

An appendix to this brief cites the venue provisions and the change of venue provisions in the several States. It is interesting to note that the principle of forum non conveniens as a ground of change of venue is explicit in the statutes of almost half of the States. Similar situations existed under the old Federal Judicial Code. Title 28, Section 114, designated the divisions within districts which suits might be brought. Section 119 provided for transfers to other divisions on stipulation. Section 163 made the same provisions for cases in Maine. Adverse change of venue was permitted in Arizona (Section 143). Montana (Section 172), New Mexico (Section 177). Ohio (Section 181), and formerly Indiana (Section 120). The first three of these sections express the doctrine of forum non conveniens. Section 121 authorized transfers to new districts.

Indeed, Sections 1391 [c], 1391 [d], 1392 [b], 1993 [b], 1395 [a], 1395 [c], 1395 [d], 1395 [e], 1396, 1397, 1398, 1400 [a], 1400 [b], 1401 and 1402 [b] of the new Federal Judicial Code all give the plaintiff a choice of venue.

The choice of venue given the plaintiffs in each of these sections is no more and no less absolute than the choice of

venue given under the F. E. L. A. The wording of this section of the F. E. L. A., "an action may be brought," is repeated again and again in the sections just referred to. Yet Section 1404 [a], permitting a transfer by the District Court in derogation of the plaintiff's choice, was drafted as a portion of the identical chapter which gave the choice of venue in each of these fifteen instances. Indeed, Section 1404 [a] permits transfer only to another division "where it might have been brought." It is quite plain, therefore, that while this chapter intended to grant a choice of venue to plaintiffs in the first instance, it was intended that their choices should be controlled by the District Court.

It is, therefore, demonstrated that there was no implied repeal of any part of Section 56 of the F. E. L. A. by the adoption of Section 1404 [a]. Section 56 still designates the districts in which such suits may be brought, and that is where such suits will be tried, as they have been heretofore, unless a change of venue is applied for under Section 1404 [a].

Full effect can still be given, and should be given, to Section 56 of F. E. L. A. This is the precise effect which will be given to the specified paragraphs of Sections 1391 to 1402 of the Judiciary Act. Section 56 has never done more than designate the districts in which suits may be brought. Suits may now be brought there as formerly. That actions may now be transferred therefrom when the court finds that convenience and justice so require in no way modifies or changes the declaration of the statute.

(b)

The argument derived from the legislative histories of the bill and of the contemporaneous Jennings bill[1] proceed from the same false premise.

[1] H. R. 242, 79th Congress, 1947; H. R. 635, 79th Congress, 2d Session; H. R. 1639, 80th Congress, 1st Session, 1947.

The Jennings bill would have amended Section 56 of Title 45 by more narrowly limiting the districts where suits under F. E. L. A. might be brought, irrespective of considerations of convenience and justice. It is one thing to foreclose a particular district court to an injured employee altogether. This the Jennings bill would have done. (So would the proposal of Congressman Devitt have done. 34 A. B. A. Journal 532.) It is quite another to admit him to that court conditionally upon the court's determination that to do so is not inconvenient to the parties and witnesses nor against the interests of justice. It is by no means inconceivable that the same Congressman would vote against the one and for the other. Indeed, modern tendency in the development of Federal procedure (e. g., Hickman v. Taylor, 329 U. S. 495, and the amendments to Rules 27, 33 and 34 of the Rules of Civil Procedure, effective March 1, 1948), is to accord Federal District Court Judges greater and greater discretionary powers, which would lead us to expect just such a combination of legislative votes as was here cast.

We have noted that there is nothing in Section 56 of F. E. L. A. which requires the **trial** of the cases in the district where the suit is filed. By its terms it only regulates the place of **filing** such suits. Since there is no federal common law (Erie R. Co. v. Tompkins, 304 U. S. 64), and since Congress had enacted no applicable rule of forum non conveniens nor any mode of transfer, the Supreme Court held quite logically that the case being filable in a certain court it should be tried there (B. & O. v. Kepner, supra).

There can hardly be more cogent extrinsic proof of legislative intent than the report of the committee which drafts the bill to the enacting body. The report of the committee on the Judiciary of April 25, 1947, accompanying H. B. 3214, being Report No. 308 of the 80th Congress, 1st

Session, simply forecloses the contention that Section 1404 [a] does not mean what it says.

The report, to which the reviser's notes were annexed, reads:

> "The reviser's notes are keyed to sections of the revision and explain in detail every change made in text. **References to court decisions are supplied wherever necessary or appropriate.**"

The reviser's notes themselves on Section 1404 [a] read:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. **As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio.** The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

This report and the reviser's notes were before Congress from April, 1947, till the adoption of the Code in June, 1948.

It will not do to say that the drafters (the reporting committee) and the enacters (the Congress) did not mean to make 1404 [a] applicable to cases arising under F. E. L. A. when the report of the one to the other pursuant to which the law was adopted expressly stated not only that this was intended, but that the decisions construing this clause of the F. E. L. A., and which plaintiff insists were not affected, were the very occasion for the enactment of 1404 [a].

It has been stated that this change in the provisions of the F. E. L. A. is a controversial matter, that the bill was described as non-controversial by some of the Senators and Congressmen, and, therefore, that Congress could not have intended this change. Congressmen supporting the Code have been quoted as seeking to avoid controversial substantive changes of law "wherever possible and whenever possible" (Congressman Keogh, quoted in U. S. Code Congressional Service, 28 U. S. C., p. 1945). It is plain that this was not always and everywhere possible. For one example compare the note to Section 2283 and Toucey v. New York Life, 314 U. S. 118. See also reviser's notes to Sections 1391, 2406 and 2461, the debate on the Tax Court provisions (U. S. Cong. Serv., 28 U. S. C., p. 1992 et seq.), and Senator Donnell's remarks quoted ibid, p. 2029: "Extensive hearings were held, at which various controversial matters, and particularly one controversial matter, relating to the Tax Court, were heard."

However, non-controversial Congressmen hoped to be, it is not their hopes that control; what they did is what counts, and this is another and even more fundamental rule of statutory construction.

In Caminetti v. U. S., 242 U. S. 470, 490, the title "White Slave Traffic Act," and the report of the committee to the House strongly indicated that the act was directed to control commercialized vice and not to individual acts of immorality. Yet the court held:

> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation (citing authorities). But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the

legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See Mackenzie v. Hare, 239 U. S. 299, 308."

(c)

In the new Judicial Code Congress authorized the transfer of "any civil action." There are no exceptions. This is a civil action. If there is extrinsic evidence that Congress did not expect the section to apply to cases arising under the F. E. L. A., such evidence is of no consequence, for Congress did not enact any such intention, but the precise opposite.

This rule of construction applies to any written expression of intent. It is most pungently put by Mr. Justice Pitney in Chater v. Carter, 238 U. S. 572, 584:

"The guiding principle must be, to seek the intention of the settlor. We mean, of course, his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test."

Respectfully submitted,

FRANK Y. GLADNEY,
JAMES C. JONES, JR.,
407 North Eighth Street,
St. Louis (1), Missouri,
Attorneys for *Amicus Curiae*.

LON HOCKER, JR.,
Of Counsel.

APPENDIX I.

Coexisting Permissive Venue Statutes and Adversary Change of Venue Statutes.

State Code	Venue	Change of Venue	Forum Non Conveniens by Express Statute?
Alabama 1940	Tit. 7, par. 5	Tit. 7, par. 65	
Arizona 1939	Ch. 21, Art. 101	Ch. 21; Art. 104	Yes
Arkansas 1937	Sec. 1398	Sec. 14340	
California Civil Procedure	Sec. 395	Sec. 397	Yes
Colorado Civil Procedure 1935	Rule 98	Rule 98	Yes
Connecticut 1930	Sec. 5444	Sec. 5451	Yes
Delaware Const.	Art. 7	Art. 1	
Florida 1941	Sec. 46.01	Sec. 53	
Georgia 1933	Ch. 3, Sec. 201	Secs. 207-208	
Idaho 1932	Tit. 5, Sec. 404	Sec. 406	Yes
Illinois 1947	Ch. 110, Sec. 129	Ch. 146, Sec. 20	
Indiana 1933	Tit. 2, Sec. 707	Sec. 1401	Yes
Iowa	Sec. 616.17	Sec. 167	
Kansas	Ch. 60, Sec. 509	Sec. 511	
Kentucky Civil	Secs. 79-80	R. S. '43, 452.010	
Lodisiana Practice	Art. 162	Art. 342.12	
Maine 1944	Ch. 99, Sec. 9	Ch. 100, Sec. 24	
Maryland	Art. 75, Sec. 157	Art. 75, Sec. 157	
Massachusetts	Ch. 223, Sec. 1	Sec. 13	
Michigan 1929	Sec. 13997	Sec. 13998	
Minnesota 1945	Sec. 542.09	542.11	Yes
Mississippi 1942	Sec. 1403	Sec. 1443	
Missouri 1939	Sec. 871	Sec. 1062	
Montana	Sec. 9096	Sec. 9098	Yes
Nebraska 1943	Ch. 25, Sec. 409	Sec. 410	
Nevada 1929	Sec. 8571	Sec. 8572	Yes
New Hampshire 1924	Ch. 328, Sec. 1	Sec. 3	Yes
New Jersey 1937	Tit. 2, Sec. 27-19	Sec. 27-20	
New Mexico 1941	Ch. 19, Sec. 501	Sec. 503	
New York Civil Practice Act	Sec. 182	Sec. 187	Yes
North Carolina 1943	Ch. 1, Sec. 82	Sec. 83	Yes
North Dakota 1943	Ch. 28, Sec. 0405	Sec. 0407	Yes
Ohio	Sec. 11277	Sec. 11415	
Oklahoma	Sec. 139	140	

State Code	Venue	Change of Venue	Forum Non Conveniens by Express Statute?
Oregon C. L.	Tit. 1, Sec. 403	Sec. 404	Yes
Pennsylvania General S.	Tit. 12, Ch. 1, Sec. 101	Secs. 111, 113	
Rhode Island 1938	Ch. 511, par. 2	Ch. 496, par. 21	
South Carolina 1942	Sec. 422	Sec. 426	Yes
South Dakota 1939	Title 33, Sec. 0304	Sec. 0306	Yes
Tennessee 1938	Sec. 8640	Sec. 868[illegible]	
Texas 1925	Art. 1995	Art. 2170	
Utah 1933	Sec. 104-4-7	Sec. 104-4-9	Yes
Vermont 1933	Sec. 1565	Sec. 1567	
Virginia 1942	Sec. 6049	Sec. 6175	
Washington	Sec. 205-1	Sec. 209	Yes
West Virginia 1937	Sec. 5517	Sec. 5699	
Wisconsin 1947	Sec. 261.01	Sec. 261.04	Yes
Wyoming 1931	Sec. 89-708	Sec. 89-1101	Yes

APPENDIX II.

Cases known to the amicus in which transfer under 1404. [a] of a case arising under F. E. L. A. has been decided:

Transfer allowed:

Hayes v. Rock Island, Minn. 4th Div., Sept. 25, 1948, 79 F. Supp. 821;

Collett v. L. & N., E. D. Ill., Oct. 18, 1948;

White v. Thompson etc., N. D. Ill., Oct. 4, 1948, 80 F. Supp. 411;

Nunn v. C. M. St. P. & P., So. D. N. Y., Nov. 9, 1948, 80 F. Supp. 745;

Kilpatrick v. Texas & P., So. Dist. N. Y., Nov. 22, 1948.

Transfer denied:

Pascarella v. N. Y. Central, E. D. N. Y., Nov. 19, 1948;

Tabor v. So. Railway, E. D. Mo., Nov. 23, 1948.

Related cases:

U. S. v. National City Lines, So. D. Cal., Oct. 12, 1948, 80 F. Supp. 734;

Stevenson v. Erie, S. D. N. Y., June 11, 1948, 80 F. Supp. 393, collating authorities discussing legality of contracts limiting venue choice under F. E. L. A.